A ORISSA HYDRO POWER CORPORATION LTD.

*v.*

SANTWANT SINGH GILL (DEAD) BY LRS. AND ORS.

JULY 24, 2006

B [ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

*Appeal—First appeal—High Court dismissed same without considering two relevant issues—Hence directed to re-examine the matter—Re-consideration limited to the said two issues.*

C

*Review petition—Not maintainable before High Court, when basic issues relating to alleged grievances not placed for consideration before the High Court earlier.*

D **Original Respondent No.1 had entered into an agreement with the Executive Engineer, Indravati Dam Division for concrete-cum-masonry work of the Indravati Dam. Disputes arose with regard to the agreement. Respondent No.1 filed money suit against Respondents No.2 to 4 i.e. the State Government; the General Manager, Upper Indravati Hydro-electric project and the Executive Engineer, Indravati Dam Division. The suit was decreed. Respondents No.2 to** E **4 filed first appeal before the High Court which was dismissed.**

**Pursuant to enforcement of the Orissa Electricity Reforms Act, 1995 and the Rules framed thereunder, the Hydro Electric Project alongwith all its circles and Divisions with all assets and liabilities was transferred by the State Government to the appellant-corporation. Appellant filed review** F **application before High Court with regard to the First Appeal. The application was dismissed. Hence the present two appeals, one against the judgment rendered by High Court in the First Appeal and the other against the order passed on review application filed by Appellant.**

**Disposing of the appeals, the Court**

G

**HELD: 1.1. Several relevant factors have not been considered by the High Court; for example the effect of the letter purported to have been written by Respondent No. 1. [816-C]**

H

**1.2. The High Court has not made any effort to find out as to whether the work in question was extra work and/or covered by agreement. If it was covered by the agreement, the question of assurance, if any, given as claimed is inconsequential. If it was a part of agreement it was to be covered by the rate stipulated. In that event there is no question of any assurance having any role to play. This aspect has also not been considered by the High Court. Additionally, if work was to be completed by 2.8.1985 as claimed by the respondents, the question of any payment being made for idle work beyond the said date does not arise. This aspect was also required to be analysed by the High Court which has not been done. In the fitness of nature, therefore, the High Court should re-examine the matter on the aforesaid two aspects and decide the matter in accordance with law. [816-E-G]**

**2. However the High Court had rightly rejected the review petition. Since the basic issues relating to alleged grievances were not placed for consideration before the High Court earlier there was no scope for entertaining a review petition. [817-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3113 of 2006.

From the Judgment and Order dated 19.6.2002 of the High Court of Orrisa at Cuttak, in First Appeal No. 168/1991.

WITH

C.A. No. 3114/2006.

Raj Kumar Mehta for the Appellant.

Janaranjan Das, Swetaketu Mishra, S.K. Sanganeria, Jamshed Bey and Parmanand Gaur for the Respondents.

The Judgment of the Court was delivered by

**ARIJIT PASAYAT, J.** Leave granted.

The appeal arising out of SLP(C) No.17187 of 2003 is directed against the judgment rendered by a Division Bench of the Orissa High Court in the First Appeal. The appeal relating to SLP (C) No. 16439 of 2003 is against the order passed on a review application filed by the appellant relating to the connected first appeal.

A The factual background in a nutshell is as follows :

An agreement bearing No. 21F2 of 1984-85 was executed between the original respondent Santwant Singh Gill (who has died in the mean time and is represented by his legal representatives) and the Executive Engineer, Indravati Dam Division for construction of Concrete-cum-Masonry work of the Indravati B Dam of Block No. 18 upto RI 625.5. Stipulated dates of commencement of work and completion of work were 2.2.1985 and 1.5.1985 respectively. Since the respondent did not complete the work and did not participate in the measurement, by letter dated 6.1.1986 the respondent was asked to accept the final measurements of the work done by him. Subsequently the work was C assigned to another contractor. A writ petition was filed by the respondent questioning the decision. High Court disposed of the matter directing the authorities to consider the grievances. In September, 1986 the respondent filed a suit in the Court of Subordinate Judge, Jeypore being Money Suit No. 417 of 1986 claiming a sum of Rs.8,93,659.91/- with pendente-lite and future interest @ 18% per annum. The defendants in the said suit who are respondents D No.2 to 4, herein i.e. State of Orissa, the General Manager, Upper Indravati Project and the Executive Engineer, Indravati Dam Division filed written statement denying the claim, except for a sum of Rs.94,006.40/- and prayed for dismissal of the suit. The admitted amount was paid in November, 1987. The suit was decreed on 20th March, 1991 for Rs.7,03,375.29/- along with pendente-lite interest at the rate of 12% and future interest at the rate of 9% E p.a. on the principal amount of Rs.6,51,077.29/-.

The respondents No.2 to 4 filed an appeal before the High Court which was dismissed. Pursuant to the enforcement of the Orissa Electricity Reforms Act, 1995 and Orissa Electricity Reforms (Transfer of undertaking, assets, F liabilities, proceeding and personnel) Schemes Rules, 1997 framed thereunder, the Upper Indravati Hydro Electric Project alongwith all its circles and Divisions with all assets and liabilities was transferred by the State Government to the appellant with effect from 1.4.1996. Since the appellant was not a party in the First Appeal, prayer for permission to file SLP was made and has been granted, and that is how the appeals have been filed. As noted above the G High Court dismissed the First Appeal and the application for review filed by the appellant was rejected by the High Court on the ground that no case for review was made out. At this juncture it is to be noted that certain stands which were not highlighted in the First Appeal were sought to be introduced by the appellant in the review petition.

H

Learned counsel for the appellant-Corporation submitted that basically two issues were considered by the High Court. They related to (1) whether any extra work was undertaken by the respondent and (2) whether damage on account of idle labour was payable. State's stand was that Clause 11 of the Agreement clearly indicated that M-150 is purely an extra item and as such the plaintiff i.e. present respondent would be entitled to receive payment as per schedule of rate of 1982. The High Court proceeded on the basis that though the work in question is not stipulated in the agreement, it was known to the parties concerned that there was a change in the design and as given in the drawing (Exhibit N), the execution of M 150 grade concrete work was necessary. This according to learned counsel for the appellant runs counter to the observation of the High Court. The stand of the respondent before the courts below was that the Executive Engineer had assured payment as per agreement for M-200 grade concrete work for which the agreement was executed and the work had commenced. As there was no official communication in that regard, the respondent informed the Executive Engineer to allow him to commence the work and confirm the arrangement.

Learned counsel for the appellant further submitted that it has not been established that any assurance was given. Even if it is conceded for the sake of argument that any assurance was given, the same is clearly unauthorized and in any event the respondent himself accepted that this was an extra item of work and that the schedule of rates applicable in 1982 were applicable. Strong reliance was placed in this regard on a letter purported to have been written on 30.9.1985 by the respondent.

The other item awarded which was questioned related to payment for idle labour. It was submitted that the time period for completion of work expired on 1.5.1985 and even if the claim of the respondent that there was extension up to 2.7.1985 is accepted, the courts below were not justified in granting compensation for idle labour up to 6.1.1986. It is submitted that the High Court has not given practically any reason, to uphold the award in respect of these items. So far as the first item is concerned, the High Court merely observed as follows:

> "In view of what has been stated above, we are inclined to concur with the finding of the learned trial Judge that the plaintiff is entitled to be paid for the M-150 grade concrete work at the rate for M-200 grade concrete work."

Similarly, it was submitted that in regard to the claim relating to idle

A labour the High Court did not even consider as to the period by which the work was to be completed. If no extension of time was granted beyond 2.8.1985 which according to the courts below was the last date by which the work was to be completed, the appellant could not have been directed to make payment for a period (a) from 26.2.1985 to 13.4.1985 and (b) from 3.7.1985 to 6.1.1986.

B

In response, learned counsel for the respondents submitted that both the trial court and the High Court have analysed the factual position and have worked out the entitlement of the respondents and there is no infirmity so as to warrant any interference.

C

We find that several relevant factors have not been considered by the High Court; for example the effect of the letter purported to have been written by the respondent- Santwant Singh Gill. The relevant portion reads as follows:

> "In the meantime, due to change in design, I was asked to do plain
D concrete in place of masonry. *This item of work was not contemplated in my agreement.* However, I have done the plain concrete *at the schedule of rate.*"
>
> (Underlined for emphasis)

E The High Court has not made any effort to find out as to whether the work in question was extra work was and/or covered by agreement. If it was covered by the agreement, the question of assurance, if any, given as claimed is inconsequential. If it was a part of agreement it was to be covered by the rate stipulated. In that event there is no question of any assurance having any role to play. This aspect has also not been considered by the High Court.

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Additionally, as rightly pointed out by the learned counsel for the appellant, if work was to be completed by 2.8.1985 as claimed by the respondents, the question of any payment being made for idle work beyond the said date does not arise. This aspect was also required to be analysed
G by the High Court which has not been done.

In the fitness of nature, therefore, the High Court should re-examine the matter on the aforesaid two aspects and decide the matter in accordance with law.

H So far as the connected appeal is concerned we find that the High Court rightly held that a case of review was not made out on the grounds apart from

those which we have dealt with in the connected appeal. Since the basic issues relating to alleged grievances were not placed for considered before the High Court earlier there was no scope for entertaining a review petition. The High Court had therefore rightly rejected the review petition. The said appeal stands dismissed. A

As noted above in the appeal relating to the First Appeal before the High Court basic issues are to be examined and, therefore, the re-consideration is to be limited to the two issues indicated above. B

The appeals are accordingly disposed of. No costs.

B.B.B. Appeals disposed of.